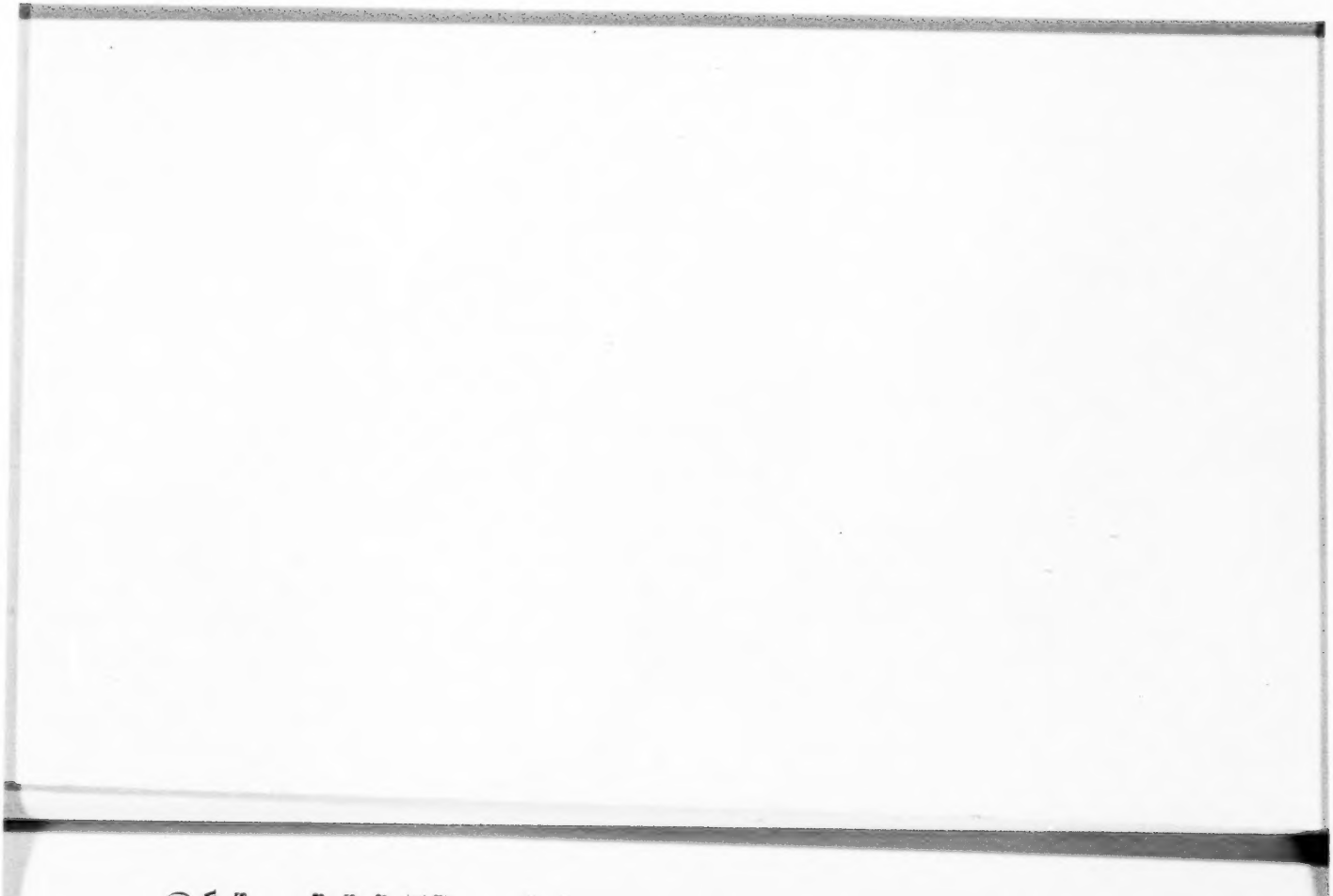

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The jurisdiction to grant the writ of *certiorari* is invoked under § 240 (a) of the Judicial Code as amended by the Act of November 13, 1935 (43 Sta. 1938, 28 U. S. C. A. § 47). The judgment of the United States Circuit Court of Appeals was rendered November 4, 1943 and became final by the denial of a rehearing on November 24, 1943. The petition is filed within the statutory period.

Opinions Below.

The opinion affirming the order of the District Court which sustained the report of the Commission on the construction of the statute that the District Court could not set aside the maximum limit of nothing as fixed by the Commission under Section 77 (c) 12 is reported in 121 F. (2) 371. *Certiorari* was denied by this Court (314 U. S., 679) and a rehearing was also denied (314 U. S. 714).

The opinion vacating the denial of the rehearing and granting a rehearing, and reversing the order of the District Court with directions to examine the evidence and to ascertain whether the report was sustained by substantial evidence was reported in 138 F. (2) 386 and appears in the record (Tr. 6-9).

The opinion sustaining the order below which is the subject matter of the petition for the writ of *certiorari* was published in 138 F. (2) 433 and appears in the record (Tr. 56-61).

Errors Relied On.

1. The report of the Commission lacked basic findings and it was the duty of the District Court to reject its report and to make the necessary findings as submitted by the petitioners and it erred in filing findings and conclusions which are neither findings nor conclusions, and are not in compliance with Rule 52(a). It was the duty of the Court of Appeals to reverse the order below and either to adopt the proposed findings or to direct the court below to make the essential findings.

2. The statement of the District Court that there is substantial evidence to support the report is contradicted by the record. The Circuit Court of Appeals was unable to point to any evidence in the record tending to support the statement of the court. It resorted to an unwarranted assumption that the Commission knew what services petitioners performed and what benefits they contributed to the estate, and it erred in substituting such "assumption" for "substantial evidence", which cannot be found in the record.

3. The undenied proof conclusively shows that there is no foundation for the report of the Commission and for the order of the District Court. It was the duty of the Court of Appeals to reverse the order with directions to sustain the objections and to reject the report.

4. The Court of Appeals again misconstrued § 77 (c) 12 when it held that the word "nothing" was embraced in the word "maximum" and it was its duty to hold that the Commission exceeded its jurisdiction when it fixed "nothing" as a "maximum" in view of the fact that it was undenied that petitioners expended $436.80 in traveling expenses from Chicago to Washington to attend hearings on the Plan, and there was no finding that the expenses were unnecessary or unreasonable.

5. The proposed findings and conclusions were supported by the undenied proof and settled principles of law, and it was the duty of the District Court to adopt them. The Court of Appeals erred in affirming its order and in substituting assumptions for substantial evidence which was lacking.

6. The assumption that the Commission knew who performed the services resulting in benefit to the estate, when it determined that petitioners were entitled to "nothing" as a "maximum" fee, which constituted the "substantial evidence" in support of its report, existed when the Court of Appeals reversed the previous order and directed the court to examine the evidence, and to ascertain from such evidence whether there was substantial evidence to support the report. There was no need to reverse the order with the directions if the court could base its order on extrinsic assumptions without regard to the evidence. The Court of Appeals, therefore, erred when it affirmed the order below.

ARGUMENT.

I.

The Commission's Report Lacked Basic Findings and It Was the Duty of the District Court to Reject Its Report and to Make Essential Findings Under Rule 52 (a). Its Mere Statement That the Report Was Sustained By Substantial Evidence Was Insufficient and It Was the Duty of the Court of Appeals to Reverse Its Order and Either to Adopt the Proposed Findings Or to Direct the District Court to Make the Proper Findings.

(a) A report of a Commission which lacks essential findings must be rejected.

A report of a Commission which is possessed of *quasi*-judicial functions must contain *basic findings* so that on review the court may determine whether the findings are supported by substantial evidence. This Court said in *Beaumont, S. L. & W. R. Co.* v. *United States*, 282 U. S. 74:

> "Complete statements of the commission showing the grounds upon which its determination rests are requisite or necessary as are opinions of law courts setting forth the reasons on which they based their decisions in cases analogous to this."

Findings of the Interstate Commerce Commission *must embrace basic facts* needed to sustain its orders (*Morgan* v. *U. S.*, 298 U. S., 468). A report of a Commission which lacks basic findings cannot be sustained (*United States* v. *B. & O.*, 293 U. S., 454; *Phelps Dodge Corporation* v. *National Labor Board*, 313 U. S., 177).

In *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2) 554, the Court said:

> "The requirement that courts, and commissions acting in a *quasi*-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra-legal considerations; and *findings of fact serve the additional purpose*, where provisions for review are made, *of apprising the parties and the reviewing tribunal of the factual basis* of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. *When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis*, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. *The requirement of findings is thus far from a technicality.* On the contrary, it is *to insure against Star Chamber methods*, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts." (Emphasis ours)

This applies on all fours to the so-called "Findings and Conclusions" of the Court (Tr. 27).

(b) The report of the Commission lacked the basic facts, and it was the duty of the District Court to sustain the objections and to reject its report, and the Court of Appeals erred in affirming its order.

Petitioners were allowed to intervene before the Commission and before the District Court early in 1935 (Tr. 14). § 77 (c) 12 provides that,

> "within such maximum limits as are fixed by the Commission, the judge may make allowance * * * for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties interest * * *".

Petitioners expended $436.80 (R. 21). Schedule "B" contains an itemized statement of the expenses (R. 32), including $7.30 for printing the petition for modification and $4.50 for printing objections to its report, and the balance was for *traveling expenses from Chicago to Washington in connection with the hearings before the Commission.* Meyer Abrams was cross-examined extensively as to these expenses (Tr. pp. 22-24). In order to justify the "maximum limit" of "nothing" or "zero" for the $436.80 expended, it was necessary for the Commission to make the *basic findings*: (1) that the expenses were not incurred, or (2) that the expenses were unnecessary, or (3) that they were unreasonable (*Great Northern R. R. Co.* v. *Sullivan*, 294 U. S. 458). The Commission found (R. 69) that petitioners "*performed services and incurred expenses from July* 18, 1935". It found that they became *parties by intervention* "before the Court and the Commission". It found that they filed exceptions to the report of the Examiner and filed a petition for modification of the Commission's Report. *Having made these findings, it was required to find that the* $436.80 *was unnecessarily expended or unreasonable, or that it was not necessary for the petitioners as intervenors to attend the hearings.* In vain will one look for such a finding, as *there is none.* There was a finding, or rather a conclusion, that "the services rendered were of no benefit to the estate" (R. 70), but *there was no finding that it was unnecessary for the petitioners who were allowed to intervene to attend the hearing concerning*

the Plan, and that the $436.80 *was unnecessarily expended, or that it was unreasonable to expend such amount.* Certainly one cannot make a "zero" or "nothing" under the guise of a "maximum limit" of $436.80 expended when the Commission *conceded* that petitioners were parties to the record and attended the hearings.

The District Court found that there was "substantial evidence" to support the report (Tr. 27). This was a bare statement, or rather a conclusion. *We challenge the respondents to point to anything in the record tending to support such statement.*

The opinion of the Court of Appeals endeavored to find some reason for the "maximum limit" of "nothing" concerning the compensation, but *not one word will there be found in its opinion tending to support the report which fixed a "maximum limit" of "nothing" as to the* "$436.80" *expended.* This point was squarely raised by the fourth objection to the report (R. 104). It was raised at the hearing before the Court, and "proposed findings" (10 and 11) related to such issue (Tr. 32), which the District Court refused to adopt. It was the duty of the Court of Appeals to reverse its order and either to make findings of its own or to direct the court below to make the essential findings.

II.

The Proposed Findings Were Supported By the Undenied Proof and It Was the Duty of the Court to Adopt the Findings Which Would Have Resulted in the Opposite Conclusion Calling for Rejection of the Report.

We will take up the "proposed findings" and demonstrate by the record that each of the findings was supported by the undenied proof.

(a) It was the duty of the Court to adopt the proposed findings which would have led to the irresistible conclusion that the report should be rejected.

It was the duty of the District Court to adopt the findings which would have resulted in the irresistible conclusion calling for rejection of the Commission's report, and the Court of Appeals clearly erred in approving its order.

The 1935 Plan: The first "proposed finding" (Tr. 29) related to the 1935 "stand-by" plan of the Debtor. This plan provided for a change in one-third of the "fixed" interest on the General Mortgage bonds to "contingent" interest, which was "cumulative" and matured in ten years. A similar change was proposed as to the fixed interest of the Fifty Year Mortgage bonds as to the entire interest. There was also a provision for a "voting trust" and the personnel was chosen in advance by the proponents of the plan. The accuracy of this "proposed finding" is shown by the Report of the Commission (Vol. V, pp. 2182-2185).

This finding was necessary in connection with the claim for services in pointing out the objectionable features of the plan, which were subsequently cured by the 1938 plan, which was more fully described in the petition (R. 20) and in the testimony in support of the petition (Tr. 26). This finding was, therefore, improperly rejected.

The Services: The second "proposed finding" (Tr. 29) related to the allowance of the intervention by the Court as well as by the Commission and concerning the hearings held before the Commission with reference to the 1935 plan, which hearings were held at Washington on August 5, 6, 7 and 8, 1935. The accuracy of this finding is *beyond dispute* for *even the Com-*

mission stated in its report (R. 69) that petitioner "intervened in the proceeding before the Court and the Commission" and participated in the hearing before the Commission on the plan of reorganization. Their appearance and active participation at these hearings appears in Volumes I and II (pp. 249-1052).

In view of the finding of the Commission (R. 69) that petitioners "performed services and incurred expenses from July 18, 1935" amounting to $436.80 *which included trips to Washington concerning these hearings* (R. 32), the "proposed finding" was important as bearing on the issue whether the "maximum limit" of "nothing" for the expenses was supported by "substantial evidence" as stated by the Court (Tr. 27). It is *obvious* that if the Court had found that petitioners were allowed to intervene and attended the hearings at Washington, D. C., before the Commission in opposition to the 1935 plan, *that its conclusion that the "maximum limit" was "nothing", could not be sustained.* The limit of *"nothing"* or *"zero" could not have supplied the transportation expenses for Railroad fare from Chicago to Washington.* It was the duty of the Court to adopt the proposed finding and set forth that petitioners obtained leave to intervene in the District Court and before the Commission and *necessarily incurred* traveling expenses from Chicago to Washington in attending the hearings from August 5th to August 8th, 1935. *Such a finding would be inconsistent with the "conclusion" that* the "maximum limit" for such expenses was *"nothing"*.

Benefit to the Estate

The third "proposed finding" (Tr. 30) related to the activities of the petitioners at hearings concerning the 1935 plan in August, 1935, showing that they brought out

by their evidence and argument that the plan was unfair and not feasible, *due to the cumulative features for the payment of the contingent interest at the end of the ten year period.* This finding had a direct bearing on the question whether the statement of petitioners that their services contributed to the defeat of the 1935 plan was true (R. 20), or whether the Commission's report that the statement is not borne out by the evidence, was justified. The Commission stated in its report (R. 69): "They state (petitioners) that their efforts were primarily responsible for the abandonment of the first plan, and the abandonment of the proposal for a voting trust. We are not persuaded that the evidence supports such a statement". If the Court had given the requested finding, it would have been compelled to say that the claim of the petitioners *was supported by the evidence, contrary to what the Commission said.* We will, therefore, *demonstrate* that the "proposed" finding is *supported* by the evidence.

The proposed finding was to the effect (Tr. 30) that the Debtor and Institutional Groups sponsored the 1935 plan and the *only* group which *opposed* them was the Group represented by the petitioners, who actively participated in the hearing in the examination of witnesses, in the production of evidence and in argument. The Court was asked to find that petitioners urged (Tr. 30):

(a) that the plan, which did not change the capital structure and only changed the interest from "fixed" to "contingent" was unfair and unreasonable as the debtor would have emerged from the reorganization with a shortage of a million and a half for "fixed" interest charges;

(b) In the event of a default in the "cumulative" interest on the General Mortgage, the 50-year mortgage bond issue would have been wiped out on foreclosure;

(c) In the event of a similar default on the cumulative interest on the 50-year Mortgage bonds all of the capital stock (given in exchange for the Adjustment Bonds), would have been wiped out.

(d) The "voting trust" was unfair in that no representation was given to the Adjustment Mortgage bondholders who were given stock without a voice in the management.

Volumes I and II contain the proceedings before the Commission concerning said plan, and such record speaks for itself. The hearings were commenced August 5, 1935 (Vol. I 249): Mr. W. K. Sparrow was the first witness and was examined on direct by Mr. Swaine, counsel for the Debtor. His direct testimony (pp. 271-366) *tended to show the fairness and feasibility of the plan;* 96 exhibits were introduced in evidence in support of the plan. He was cross-examined by Mr. Abrams (pp. 401-420).

The cross-examination brought out the facts that the "net" income under the plan (based on the average income for the years 1932, 1933, 1934) *would be* $1,500,000.00 short to cover the "*fixed*" charges; that the railroad *would have emerged from the reorganization with an immediate deficit of* $1,500,000.00 *on the "fixed" charges* (p. 403). Mr. Abrams showed that *the entire plan was unfair and unfeasible* because it left the *divisional mortgages undisturbed,* and the change from the "*fixed*" interest on the General Mortgage to "contingent" interest as to *one-third* thereof, and from the "fixed" interest on the 50-year Mortgage to "contingent" interest, was fraught with danger because the interest was "*cumulative*" *and became "fixed"* in ten years. In the event of a default in the General Mortgage interest payment, the 50-year Mortgage bonds, as well as the Adjustment Mort-

gage bonds (who were to be given stock in lieu of the bonds) *would be completely wiped out.* In the event of a default in the 50-year Mortgage bonds, the Adjustment Mortgage Bonds (exchanged for stock under the plan) would likewise be wiped out.

In answer to his question whether in view of the fact that a default was *imminent*, the *cumulative* features under the Fifty-Year Mortgage might result in wiping out the stock allotted to the Adjustment Mortgage bondholders, the following answer was given (Vol. I, p. 405):

> "The plan provides that if ten years' interest accumulates on those bonds, they can do that. If the adjustment bondholders which get the new preferred stock and the present preferred and common stock which get the new common stock, did not feel at the time that that condition should arise, that it was worth their while to assess themselves one-half year's interest, so as to prevent the full ten years accumulating, *then the 50-year bonds could come in and foreclose, and, as you say, wipe it out*, assuming that the courts confirmed and approved"

The further question was asked:

> "Under the present earnings, would there be sufficient money to pay interest during the next ten years under the 50-year mortgage?"
>
> The answer was:
>
> "No, sir, there won't be on the present level of earnings this year, if that is what you mean.
>
> Q. I mean on earnings of the past three or four years.
>
> A. *No, sir, there would not be.*
>
> Q. So that *it is a foregone conclusion*, if the road *had an income similar to the past* three or four years, *the 50-year bonds can wipe out all the stock and all the* adjustment mortgage bonds?"

The answer was "yes".

The question was asked (Vol. 1, p. 415) whether a default in the cumulative interest on the General Mortgage bonds would not wipe out the 50-year Mortgage, which was a junior lien, and the answer was:

> "If we can conceive that the earnings of the company run for ten years so that the one-third interest of the general mortgage is not paid, I suppose that also is correct."

It is demonstrated from the foregoing that the *unfairness of the plan and its dangerous features were brought out and contested by these intervenors and their counsel, (the petitioners), and by no one else.* No one else called it to the attention of the Commission at the hearings on August 5, 6, 7 and 8, 1935, and all other groups sponsored this plan and *urged its adoption* (Tr. 15, 26).

This *inequitable plan* had the *approval* of the Debtor and the Institutional Groups and Mutual Savings Banks. The Debtor's witness admitted on the cross-examination (p. 406) that prior to the submission of the plan, it was submitted to the "representatives of Insurance Groups and Savings banks". He stated (Vol. 1, p. 409) that the "plan was a growth; it was not one produced and sponsored but was a gradual development of discussions, not only among ourselves and our Board, but the large owners, who were met with, from eighteen or nineteen groups."

Mr. Scandrett, one of the Trustees, and the president of the Railroad, testified that the 1935 plan had the approval of a special committee (p. 462); that (p. 510) "a great deal of thought and time and attention were devoted to the preparation of that position" and they "were very greatly aided by advice of counsel, of Chairman Jones of the Reconstruction Finance Corporation,

and by the services of insurance companies, trust companies, and savings banks which own over $100,000,000.00 worth of our securities"; that (p. 511) "*The plan is the best plan*" that *they* "could devise with the limitations that have confronted" them.

Mr. Burgess, counsel for the Institutional Groups, *then supported the plan* and gave his reasons in support of the plan (pp. 536, 537).

From the foregoing reference to the record it is conclusively demonstrated that the third "proposed finding" was true. The finding was necessary to the most vital *issue* in the case, namely, *whether or not the services rendered were of any benefit to the estate.* The failure to give the requested finding was clearly erroneous, as such a finding would not have justified the Court's conclusion.

The fourth proposed finding (Tr. 30) was that at the close of the hearing concerning the Debtor's plan, *its adoption was urged by all other groups,* notwithstanding the objectionable features as pointed out by petitioners. The correctness of this finding is not open to dispute. The testimony of Mr. Abrams (Tr. 15) that the 1935 plan was agreed in advance by the Debtor, the "Institutional Groups" and the other Bankers who even agreed on the persons who were to be the "Voting Trustees", stands undenied. It is supported by the record (Vol. 1, pp. 413-414).

The fifth proposed finding (Tr. 30), that on June 16, 1937, the Debtor changed its position (on the ground previously urged by Mr. Abrams) *that the cumulative features were objectionable* and that the other groups *still urged the adoption of the plan,* is also sustained by the record. At the close of the evidence in August 1935, it

ended with the recommendation of counsel for the Debtor and for the Institutional groups that the plan *was then fair and equitable* (Vol. I, pp. 250-254). At the hearing held on June 16, 1937, before the Commission, which was not attended by the petitioners (Vol. II, p. 547), Mr. Furman R. Dick appeared as a witness and testified that he was a director and a member of the committee which previously recommended the 1935 plan. In urging now the *inadvisability* of the adoption of the plan, he testified (p. 600):

> "If it is determined that contingent interest bonds should be provided as part of the new financing media, then *the provisions of the* 1935 *plan with respect to contingent interest on the* 50-*year* 5% *mortgage bonds present a difficulty* even more acute than was presented by the 1935 plan itself. *Cumulative provisions, unqualified, and unlimited, may result in distortion of railroad capital structures.*"

He further testified:

> "Even if the 50-year mortgage bonds are to be given full cumulative contingent interest, it seems to me that *further study must be given to the provisions of the* 1935 *plan, that a ten year accumulation of interest would constitute a default.*"

It is evident from the foregoing that the *evidence adduced by the petitioners that the cumulative features were unfair and that the debtor would emerge from the reorganization under the* 1935 *plan a cripple made an impression and brought a change of heart.*

The Institutional Groups did not even concede thereafter that the plan was unfair because of the cumulative feature. At a subsequent hearing Mr. Burgess, on behalf of the Institutional Groups, stated (p. 630):

> "While, of course, the contention previously adopted, at our consent, has not been met, that is, the

plan has not promptly been adopted, *nevertheless its provisions in the main have been complied with under appropriate orders of the Court.* We are, therefore, *still willing to acquiesce in the plan* as a vehicle of prompt reorganization at this time."

He further stated:

"*We are not agreeable to changes in this plan which will affect the priorities of the mortgage liens as to either principal or interest* * * *. We do not understand that those representing the debtor propose any such modification, and *that the plan as previously proposed is not withdrawn or modified.* With this understanding we interpose no objection to the suggested adjournment."

This proposed finding tending to support the statement in the petition on which the claim for fees was based was therefore clearly improperly refused.

The sixth "proposed finding" (Tr. 30-31) was that at the hearing of September 20, 1937, the Debtor and the Institutional groups sought an *indefinite delay,* which was *opposed* by the petitioners and *who urged that the Commission should formulate a plan of its own* and whose position was *sustained* when the Commission denied the postponement and directed the preparation of briefs, is also supported by the undenied proof.

The hearing commencing September 20, 1937, was attended by Mr. Abrams (p. 636). At such hearing Mr. Scandrett the president of the road and one of the Trustees testified on direct examination by Mr. Swaine, calling attention to a resolution of the Board of Directors to the effect that no plan of reorganization should be adopted at this time, and he stated that negotiations were on between the Debtor and Mr. Walker, as the chairman of the committee for the Industrial Groups, concerning modi-

fications of the plan, but that an agreement had not yet been reached, and he asked for an *indefinite* postponement. The witness was cross-examined by Mr. Abrams (p. 644). He *conceded* that he had previously testified that the plan was fair, but claimed that he did not say that it was feasible. The witness was then asked (p. 647):

> "I am asking whether you now admit that the plan that was proposed by the debtor is not feasible."

He answered:

> "No, *I do not admit that.* It is conceivable that *this plan well might work out* * * *. *There are no evils in the present plan*, as far as we are advised."

Furman R. Dick then testified, on direct examination, (R. 651) urging the indefinite postponement of the hearings, and was cross-examined by Mr. Abrams (p. 660). *He conceded that he had previously approved the* 1935 plan and that if the various divisional mortgages could be eliminated under a system plan whereby preferred and common stock could be issued in lieu of the complicated structure, it would be beneficial, and that in some instances such plans were accomplished.* At the conclusion of this hearing, Mr. Abrams stated (p. 667):

> "I would like to urge upon the Commission *not to give the continuance unconditionally.* This property has been in reorganization constantly * * *. It is not the object of §77 to come into a court * * * and to repeat the evils of the equity receiverships by throwing the company into receivership and to prevent creditors from taking their legal steps. The effects of this reorganization and the granting of continuance without anything definite is to stop creditors from pursuing their legal remedies."

He further stated:

> "Your Honors will recall that in 1935, when I appeared and examined some of the witnesses, *their*

* The plan as finally adopted created a system mortgage instead of the divisional mortgages and issued new preferred and common stock.

> *testimony was altogether different from their statements today.* The record is here. They now *admit what I contended in* 1935, *that the other plan, if carried out, after its completion would predicate another reorganization immediately thereafter.* They now admit that it cannot go through under the plan."

He further stated that he was opposed to plans presented by committees which are ostensibly organized to protect the public, but are really interested in protecting persons who have a conflicting interest. Mr. Abrams said:

> "It is about time that the public itself should have a representative to work out a reorganization, and *my suggestion is that this Commission ought to appoint a board of reorganizers,* one, two or three persons, and let them cooperate with committees, but let this board between now and the next time that the hearing will be adjourned, try *to work out a plan which will be fair and equitable to the investors.*"

He further urged that a continuance be granted upon the condition for the appointment by the Commission of a board of reorganizers *who will present to the next hearing a modified plan of reorganization* (p. 668).

Division 4 then *sustained him and denied* the motion to continue the hearings indefinitely, Commissioner Porter saying:

> "The Division gave, I think, very careful consideration to all of the grounds that were urged in that petition at that time. Now all of us up here are agreed that nothing has occurred here this morning that changes that picture from what it was when the Division considered the matter the other day, and that being true I have nothing else to do but to declare this record and this hearing closed."

Mr. Burgess then said that he would like to appeal from the decision closing the proof, and introduced Mr. Walker

as a witness in support of his petition for appeal. Mr. Walker testified, on direct (p. 674), and Mr. Abrams objected, saying:

> "I want to object to this evidence which is incompetent, irrelevant, and immaterial to the issue now."

Commissioner Porter said:

> "I just asked Mr. Burgess about that. I do not see what it is relevant to on the question of petition for rehearing, whether or not Division 4 shall be overruled, or sustained."

When the Commissioner sustained the objection, Mr. Burgess stated that he desired to make an offer of proof (p. 679). When this was objected to by Mr. Abrams, Commissioner Porter said that he thought the offer of proof was proper (p. 680). Mr. Burgess then introduced a letter that Mr. Swaine wrote on behalf of the debtor, to Mr. Walker, the chairman of the institutional groups, dated September 9, 1937, which letter referred to the application to postpone the hearings on the 1935 plan, and the letter stated that the postponement was asked because consideration must be given to "*changing the fully cumulative feature of 50-year bonds* to provide for accumulation of interest on the bonds against income for only some limited agreed period." In the colloquy that took place between the Commission and the attorneys, Mr. Swaine stated (p. 687):

> "The debtor *does not admit* that the 1935 plan is *not a feasible plan.* The debtor does not withdraw the 1935 plan."

He then referred to one of the modifications that was suggested and said (p. 687):

> "The said modification is—and the chairman was fairly specific in the letter to Mr. Walker on that—*that a full cumulative provision with respect to the 50-year fives should be eliminated* and the bonds ac-

> cumulated against income only for a limited time. *With these two modifications the debtor believes the plan is fair, equitable and feasible*, even in the light of today's circumstances."

At the conclusion of this hearing, after the offer of proof was made, Commissioner Porter asked for how long a time the parties desired to file briefs. Mr. Abrams suggested that thirty days would be sufficient, and the Commissioner finally fixed sixty days (p. 691) for the filing of briefs. Mr. Abrams then asked:

> "Will Your Honor, in the brief, expect recommendations and suggestions as to modifications of the plan?"

To which, Commissioner Porter replied:

> "Yes, that is what I understand they are for, among other things. Of course, every suggestion must be based upon facts developed here of record."

The hearing was then adjourned.

The testimony of Mr. Abrams shows (Tr. 16) that he stayed in Washington for several days, worked on the record and Brief, but when he returned to Chicago he discovered that the Commission had changed its mind and reopened the case. This is substantiated by the *ex parte* order of September 24, 1937 (p. 692), when the hearing was reopened and set for February 1, 1938. Were all of these services worth "nothing" as a "maximum"? The answer "no" is irresistible.

Had the District Court given this proposed finding, which is substantiated by the record, the court could not have reached the conclusion that the services were worth "zero".

The seventh "proposed finding" (Tr. 31) related to the *ex parte* order granting the postponement and to the

filing of a plan by the Institutional groups on January 10, 1938, and an amended plan dated January 24, 1938, both of which eliminated the objectionable features in the 1935 plan. This finding was material on the issue whether or not the services of the appellants were beneficial to the estate. The accuracy of the finding is beyond dispute.

At the hearing held February 1, 1938, Mr. Walker, chairman of the Institutional Groups, testified that the Group prepared a new plan instead of the debtor's plan for a sound capital structure, and while he was testifying Mr. Abrams interposed the objection (p. 725):

> "It appears that the witness is reading from a document filed as an exhibit, and there is no use of taking up the time of the Commission or of the lawyers here in reading it. If he has anything to add that is not in this exhibit, I think the witness should do it, but he should not be permitted to read this document."

Director Sweet sustained the objection saying:

> "There will be no necessity of reading anything that is in the exhibit."

The witness then stated (p. 726) that his committee, after a careful study of the debtor's plan, has concluded that it was not desirable to amend the debtor's plan, *but to file a new plan*, and stated the conclusions of the committee. Another objection was then interposed by Mr. Abrams (p. 727):

> "The witness has the right to testify and bring out the facts; conclusions are for this Commission, and I, therefore, ask that every statement of belief or conclusion not predicated upon evidence be stricken from the record."

Director Sweet:

> "The objection will be noted and overruled for the purposes of the hearing."

In answer to a question by Mr. Burgess as to what consideration the witness gave in determining the capital structure under the new plan, the witness answered (p. 739), that among such considerations was *that the annual charges on the contingent interest debt should be covered by the probable future normal earnings* and that the funded debt should not constitute an excessively large percentage of the capitalization after the reorganization.

This demonstrates that the points urged by the petitioners at the previous hearings as to the *unsoundness* of the debtor's plan *were given some consideration in preparing the new plan*, and that they finally *penetrated* into the "hearts" of the Institutional Groups.

The direct testimony of Mr. Walker consumed 79 pages (pp. 717-796). He was cross-examined by Mr. Abrams (pp. 809 to 829). The cross-examination showed that the debtor had some *free assets including a* $10,000,000.00 *cash fund* (pp. 812, 813); that under the proposed plan the Adjustment Mortgage Bondholders were not to participate *in the free assets*, although their claim against such assets was on a *parity* with the senior creditors (p. 819).

Attention was directed to the fact that the Institutional Groups had previously sponsored a plan which called for interest at 4½% on Series B and that the new plan called for interest *at* 5% (pp. 821, 822). *The final plan, which the Commission approved, allowed only* 4½% *on Series B*, and disapproved the committee's plan of 5%.

Mr. Abrams' cross-examination of the witness Sparrow brought out the fact that the debtor and the Institutional Groups *had agreed in advance on the voting trust and on the names of the voting trustees.* It was also shown that (p. 413) the Institutional Groups had mostly in-

vested their funds in the *senior* securities and, therefore, their interest *was primarily in the senior securities*, and not in the Junior Adjustment Mortgage Bonds. Mr. Abrams asked the witness:

> Q. "They are going to name the voting trustees on behalf of the adjustment bonds?"
>
> A. "They are naming the voting trustees on behalf of all the securities just as much as on the fives of 1975 as on the adjustment bonds."

He further asked:

> "Do you not think there is a conflict of interest here when a person is named as trustee by a superior class to represent a fiduciary of an inferior class?"

The answer was:

> "The superior class, as you call it, is making this sacrifice, and during that period they ask for a voting trust to protect their interest."
>
> Q. "So who will protect the beneficiaries?"
>
> A. "The Board of Directors."
>
> Q. "Who will elect them?"
>
> A. "The voting trustees."

A further question was asked (p. 414):

> "Does this equitable and fair plan provide in fact for the representation of adjustment bonds?"
>
> A. "They give their voting rights to the voting trustees."
>
> Q. "You understand by that, that the voting trustees will vote in favor of superior interests?"
>
> A. "I think they will elect directors who will properly manage the property to the interest of all security holders."

This bears out the testimony of Mr. Abrams concerning his opposition to the voting trust in the form as it was proposed (Tr. 17).

The voting trust was recommended by the examiner, and petitioners filed specific objections thereto (R. 17-18). The Commission, in its first report, *held that no trust*

was necessary. However, in its modified report, it recommended a voting trust, but in recommending the voting trust *it gave representation to the adjustment mortgage bondholders* who were allowed to name one of the five voting trustees. Of course the subsequent report of the Commission filed after May 1, 1940, cannot be considered.*

The ninth "proposed" finding (Tr. 31) related to the above report of the Examiner which recommended a voting trust and to which report the appellants filed objections, and the fact that the Commission eliminated the voting trust from its plan dated February 12, 1940. It also related to the fact that petitioners objected to the 5% on Series B and urged 4½%, which was adopted by the Commission. It also related to the allowance of 39,000 shares to the Adjustment Mortgage Bondholders for their "free assets", which was urged by petitioners (R. 17). The objections to the Commissioner's report speak for themselves. The fact that petitioners opposed the Voting Trust appears in the printed record (pp. 413-414). The fact that they pointed out that the interest on Series B of 5% was excessive also appears in the record (pp. 821-822). The point that petitioners urged additional compensation to the "Adjustment" for the "free assets" also appears in the record (R. 17). *If the Court had given these findings, it could not have reached the conclusion that the report is sustained by "substantial" evidence.*

The tenth "proposed finding" (Tr. 32) related to petitioners' expenses in travelling from Chicago to Washington and their stay in Washington during the hearing, aggregating $436.80. If the Court had found that appellants attended the hearings and travelled from Chicago

* Under the order of the court the claims for fees were limited to the services rendered up to May 1, 1940 (R. 10).

to Washington, *the "maximum limit" of "nothing" or "zero" could not cover such expenses.* These expenses were *not even in dispute.*

The eleventh "proposed finding" (Tr. 32) was that no objections were filed to the petition, and there was no dispute that $436.80 was expended. There is no contention that anyone filed any objections. While the lack of objections in itself is insufficient ground for the allowance of fees and expenses, it has a bearing on the issue and appellants were entitled to the finding upon which the Court could thereafter base a proper conclusion.*

While it was not necessary for the petitioners to request the Court to adopt the "proposed findings" it was done in order to aid the Court, *and it was the duty of this Court to adopt them or to make other findings on the essential issues in the case* (*Hill* v. *Ohio Casualty Co.*, 104 F. (2) 695. A Court is required to make findings on every material issue in the case (26 R.C.L. Section 97). *A request for finding is improperly denied where it relates to matter as to which the evidence is uncontradicted* (*Right Printing Co.* v. *Stevens*, 107 Vt. 359). In the *absence of specific* findings by the Commission and the Court *a reversal must follow* (*Securities Commission* v. *Chenery Corp.*, 318 U. S. 80).

(b) The Court of Appeals was unable to find the substantial evidence to support the report.

In attempting to justify the conclusion of the District Court that there was "substantial evidence" to support the report, the opinion states (Tr. 58):

* In view of the fact that these findings are supported by the undenied proof, the statement in the opinion (Tr. 60): "Nor is it for us to examine the evidence to determine whether we would have entered the same finding", is clearly erroneous.

> "The proceeding was pending before the Commission for an extended period of time, and that body was in position to observe the actions of respective counsel and to judge of the value of the services rendered by them. It knew far better than any other agency who had contributed to the solution of the perplexing problems encountered in the evolution and promulgation of a workable Plan for the successful reorganization of a sadly involved debtor."

This theory is the *basis* for the alleged "substantial evidence" and is reiterated in the opinion (Tr. 59) where the court said:

> "From all the facts it is apparent that the Commission knew full well, from the record, the nature of the services rendered by each of counsel who had contributed anything of value to the estate."*

These two statements were based on *misconceptions.* **The fundamental misconception of the court is that it was led to believe that the services were performed before the Commission, which is not a fact.** Some of the services were performed before the District Court, other services were performed before the Examiner, and the major part of the services were performed before *one* of the Divisions of the Commission (Division 4). The Commission as a *whole was not acquainted with the services, which were performed before the other bodies.* The evidence as to services rendered was taken by an Examiner and the Commission could only have formed an opinion and arrived at its deductions from the record. Due to the fact that the evidence was *not* disputed, there is *no presumption* in favor of the *conclusions* of the Commission. (*Kucoga Land Co.* v. *Kentucky River Coal Co.*,

* These assumptions existed when the Court of Appeals reversed the previous order and directed it to review the evidence to see if the report was sustained by substantial evidence. It did not direct it to look for assumptions which do not appear in the record and the court did not state that it approved the report on such assumptions.

110 F. (2) 894, 896; *Carter Oil Co.* v. *McQuigg*, 112 F. (2) 275, 279.)

The second fundamental misconception is that the Court of Appeals was led to believe that the objections to the 1935 Plan were eliminated by the Plan of the Commission, and that therefore the Commission knew "who" contributed to the elimination of objectionable features of the Plan. *This is not true.*

The opinion states (Tr. 59):

> "It is said that appellants rendered valuable services in objecting to cumulative interest upon certain Bonds proposed to be issued."

In disposing of this point the opinion says:

> "The record discloses elaborate studies of the earnings over a period of years and the comparative effect of cumulative interest with reference thereto, presented by other interests."

and then it concluded with the statement:

> "From all the facts it is apparent that the Commission knew full well from the record, the nature of the services rendered by each of the counsel who had contributed anything of value to the estate."

If the objections to the "*cumulative interest*" were removed by any plan which the Commission conceived, then the statement of the Court might be correct, because in eliminating the objectionable features the Commission would have known at whose instance it removed the objectionable features and who contributed to the result. But *the unfairness of the Plan as to the cumulative interest was not removed by any suggestion of the Commission*, but, as stated by the court, "as a result of" "elaborate studies" over "a period of years," and of the "effect of cumulative interest with reference thereto." *There is no evidence in the record showing the basis for*

these studies and upon what record they were founded. There is no testimony in the record that the change of heart on the part of the Debtor, two years later, and on the part of the Institutional Groups, approximately three years later, was brought about from studies which excluded the record made by the petitioners before the Commission. How could the Commission have known, *without evidence in the record*, "who" *achieved the results* in bringing about the elimination of the cumulative interest features by the Debtor and the Institutional Groups? It was not a mind-reader, and the "supposition" that the Commission *knew everything*, without even a *scintilla of* evidence to support it, *does not come within the test* of "substantial evidence" as required to sustain its Report (*Labor Board* v. *Columbian Company*, 306 U. S. 292).

The Court emphasized the point that petitioners were not present at the hearing in June, 1937, when the Debtor *conceded* that the "cumulative features" of the Plan made it unworkable or *unfeasible*. The point that the Plan was not feasible because of *cumulative* interest features was *first* urged by petitioners and was founded on the *studies which they made* and they brought these matters to the attention of the Commission and the parties.

The opinion states that it took "elaborate studies over a period of years." **What is there in this record to show that these studies were not based on the record which was made by the petitioners before the Commission?** True, it took the Debtor over a period of "years" to reach the conclusion which petitioners have reached at the hearings held before the Commission in August, 1935, and it took the "Institutional Groups" a longer period. This should not have reduced the compensation of the petitioners to "nothing" or "zero".

Petitioners have demonstrated from their studies of the earnings and by the cross-examination which they elicited from the witnesses that the *cumulative features were dangerous*, and because of such features the Plan was *inherently* unfair, inequitable, and fraught with danger. The Commission reached the conclusion that *such services were worth "nothing"*, and the District Court approved the report on the theory that there was "substantial evidence" to support it, when there *is not even a scintilla* of evidence to support such a report.

The theory advanced in the opinion that the "substantial evidence" consisted of the *supposed* knowledge of the Commission and that it "knew everything that transpired before it", *is a dangerous doctrine to announce.* Under such a doctrine *no finding of a Commission or Administrative Body may be disturbed, as it may always be said that there is substantial evidence because the administrative body knew what transpired before it.* Such has never been the *test* in passing on the question whether a report of an administrative body is sustained by "substantial evidence". This is *contrary* to the decisions of this Court, and to the decisions of other Circuit Courts.

In *National Labor Relations Board* v. *Union Pacific*, 99 F. (2d) 153, the question whether the report of the National Labor Relations Board was supported by "substantial evidence" was presented. There, the court could have sustained the report on the same theory that the National Labor Relations Board knew everything that transpired before it, and in reaching a *different* conclusion the Court said:

> "We are bound by the Board's findings of fact as to matters within its jurisdiction, *where the findings are supported by substantial evidence;* but we are

not bound by findings which are not so supported, 29 U. S. C. A., § 160 (e) (f); *Washington, Virginia & Maryland Coach Company* v. *National Labor Relations Board,* 301 U. S. 142, 57 S. Ct. 649, 650, 81 L. Ed. 695 * * * *Substantial evidence is evidence furnishing a substantial basis of fact* from which the fact in issue can reasonably be inferred; and *the test is not satisfied by evidence which merely creates a suspicion* or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. *Pennsylvania R. Co.* v. *Chamberlain,* 288 U. S. 333, 339-43, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819." *Appalachian Electric Company* v. *National Labor Relations Board,* 4 Cir. 93 F. (2d) 989." (Italics supplied.)

In determining the meaning of "substantial evidence" the court said:

"Substantial evidence means more than a mere *scintilla.* It is of substantial and relevant consequence and *excludes vague, uncertain or irrelevant matter.* It implies a *quality of proof* which induces conviction and makes an impression on reason. It means that the one *weighing the evidence takes into consideration all the facts* presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom, and, considering them in their entirety and relation to each other, arrives at a fixed conviction." (Italics supplied.)

It further said:

"The rule of substantial evidence is *one of fundamental importance and is on the dividing line between law and arbitrary power.* **Testimony is the raw material out of which we construct truth, and unless all of it is weighed** to its totality, errors will result and great injustice will be wrought. *National Labor Relations Board* v. *Thompson Products, Inc.,* 6 Cir. 97 F. (2d) 13, 15."

The Seventh Circuit reached the same conclusion in *National Labor Relations Board* v. *Boss Mfg. Co.*, 107 F. (2d) 578, where it said that "substantial evidence" is such as "will convince reasonable men and on which men may not reasonably differ" as to whether it supports the report of an administrative body. It must be sufficient to justify a refusal to direct a verdict in the case on trial before a jury "when the conclusion sought to be drawn is one of fact" (*Hazel* v. *Atlas Glove Co.*; *National Labor Relations Board*, 127 F. (2d) 109, 117). Substantial evidence must be more than to "create vagueness", uncertainty or suspicion of the existence of the essential facts (*Continental Oil Company* v. *National Labor Relations Board*, 113 F. (2d) 473, 481; *Indianapolis Power & Light Co.* v. *National Labor Relations Board*, 122 F. (2d) 757 (C. C. A. 7).)

All of these decisions, including the above decisions of the Seventh Circuit, are *contrary to the test applied in this case*, and may not be reconciled with the views expressed in this opinion tending to supply the "substantial evidence" which is wholly lacking and which, as a matter of law, the court should have so held were it not misled by the statements of our adversaries.

The Court said in its opinion (Tr. p. 38):

> "Speaking more specifically, it appears that counsel for the debtor, for the Institutional Investors' Group and for other interests of the same category as those represented by appellants, actively participated. Whether it was their services or those of appellants which were of benefit to the estate was a question of fact peculiarly fit to be determined from the evidence."

We agree whole-heartedly with the statement of the Court, and ask—*Where is* the "substantial evidence"

showing *who* made the contribution? On this point the opinion is silent. It is *silent because there is no such evidence,* and it had to resort to the *assumption* that the Administrative Body *knew* "who" brought about the results. *This is not a substitute for "substantial evidence."* In dealing "specifically" with another point, the opinion says (Tr. p. 59):

> "Appellants insist that they prevented inclusion of a Voting Trust, to the resulting benefit of new stockholders, but the ultimately approved Plan included such a Trust."

The order of the District Court directed the filing of the petitions on fees up to and including April 30, 1940. At the date of the performance of such services there was then pending the report of the Commission *which eliminated the Voting Trust.* The services, therefore, were to be determined *from the results accomplished at that stage of the proceedings.* The fact, that subsequently, the Commission changed its *mind should not have converted the valuable services producing such a result to a "zero."* Besides, the Voting Trust which was included in the ultimate Plan was *completely different* from the "Voting Trust" which was originally suggested. The Voting Trust that was originally suggested contained the names of persons who were selected by the various Groups *in advance of the filing of the petition for reorganization.* There was no representation given to the class of the Adjustment Bonds *while the Voting Trust which was included in the final Plan gave due representation to such class.* What is there in this record to show that this was not the result of Petitioners' efforts? Where is the "substantial evidence" to justify this finding? We cannot find it in the record. We cannot find it in the opinion of the Court, which undertook to deal "specifically" with the question.

The assertion in the opinion that the Institutional Groups and the Debtor represented the same class (Tr. 58) and therefore the objections to the inequitable features and the removal thereof may be attributed to them, **is not based on the record.** The record shows that the Debtor and the Institutional Groups **sponsored the 1935 Plan.** They **took the position that the cumulative interest features were not objectionable.** They could not have very well represented the same class in **sponsoring** the Plan and in **opposing** the Plan. The Court said in its opinion (Tr. 58):

> "Nor is there anything in the record to indicate that they communicated with the debtor or its counsel or did anything to bring about the change of position."

When attorneys appear in open court and express their views it is just *as good a communication as when done in the dark.*

The testimony of Mr. Abrams before the Commission, which is *undenied,* showed (Tr. 15) that he developed by his cross-examination that the reorganization Plan was practically an agreed matter between the Debtor, the Institutional Group, and the Bankers, even prior to the filing of the petition under §77. They *had even agreed on the selection of the Voting Trustees.* All they wanted to get was "the stamp of approval of a court." He testified that with the exception of the Institutional Group there were no other parties who represented the class of the Adjustment Mortgage Bonds at these hearings. He stated that *he was the only one at these hearings who opposed the Plan which was then recommended by the Debtor and the Institutional Groups as to the cumulative features, the Voting Trust* and other matters, and (T. R. 16) "witness after witness" stated that the Plan was

"fair" and equitable. He testified that in September, 1937, the *same witnesses who had originally testified that the Plan was equitable, fair and feasible, were compelled to admit that the plan was unfair,* inequitable and unfeasible. He also testified that he (p. 17) opposed the "Voting Trust" when "everyone was in favor of it" including the Debtor and the Institutional Group, and his opposition to the Voting Trust was not merely because it was a Voting Trust but "*because the Voting Trustees were selected in advance by the parties who brought the proceedings and who worked out the Plan before the proceedings were even commenced in court.*" He also testified that the Voting Trust was eliminated from the original Plan, and while it was modified by the inclusion of the Voting Trust, it was *completely different* in that representation was given to this class.

The point (Tr. 58) that the services performed in obtaining the appointment of independent trustees was worth "nothing" because this was required by the amendment to the Bankruptcy Act, is without merit. This Amendment was equally applicable to similar services performed by Julius Weiss whose "maximum" compensation was fixed at $1,500.00 and his expenses at $826.00 (R. 78). The Commission stated that the services of Mr. Weiss were of no benefit to the estate with the possible exception of his services in connection with the appointment of the Trustees for the Debtor. The Commission, in fixing his maximum limits at $1,500.00 for compensation and $826.00 for expenses, *did not apply the reasoning that this was compulsory on the court, by reason of the requirements of the Act,* as it said (R. 67):

> "Counsel's services were of little benefit to the estate except possibly in the matter of the appointment of Trustees."

If the argument advanced in the opinion (Tr. 58) that the appointment of Trustees followed from the amendment, and "nothing" was the "maximum limit" for such effort be sound, then why was a different scale of justice applied to the other attorney? Their own record that they produced, being an *excerpt* of what transpired in court, *and not the entire transcript* (Tr. 43) shows that petitioners *did* urge the appointment of independent Trustees. It was the court that pointed out (Tr. 44) that this was mandatory under the statute, and the court also pointed out that the amendment was made while Mr. Abrams was away in Europe; but this does not in anywise *detract from his efforts* in obtaining the appointment of independent Trustees, as shown by the evidence which is not even disputed.

We are not urging this point to deprive Mr. Weiss of his compensation, but only for the purpose of pointing out the *comparison and the discrimination*, which is always proper on the question of allowances (*Albert Dickinson* v. *Dickinson Industrial Site*, 104 F. (2d) 771, 776). If one attorney is entitled to $1,500.00 for recommending independent Trustees, notwithstanding the mandatory provision of the statute, and to the $826.00 for his expenses, there is no reason why the other attorneys, who urged this independent appointment, should be allowed "zero".

The Commission was in no position to say which of the attorneys was entitled to $1,500.00, and which of the attorneys was entitled to "zero", as *the services were not performed before the Commission*, but before the Court, and what evidence, then, is there to support this "zero" limit? There is none. The "assumption" as to "better" knowledge of the Commission is evidently fallacious.

With this evidence *unchallenged, with no evidence to contradict it*, and with the *record bearing out such* testi-

mony, there is no basis for the opinion supporting the statement of the Judge that there is "substantial evidence to support the report."

III.

The Court Clearly Erred in Not Following the Proposed Propositions of Law.

Petitioners submitted to the Court propositions of law (Tr. 32-33) which it refused to follow. It clearly erred in that respect.

(a) It was the duty of the Court to hold that it was not the intent of Congress to deprive the courts of their functions and the jurisdiction of the Commission was confined to the fixing of a ceiling within which limits the Court may allow reasonable compensation.

The construction of §77(c) 12 relating to the allowance of compensation was presented to the District Court in the *New York N. H. R. Co.*, 46 Fed. Supp., 214. There, the court discussed the question whether the "maximum total limit" should arbitrarily be fixed and within such maximum the court should allow the compensation to the various parties, and in *rejecting* that idea it said (p. 219):

> "*Such an approach would necessarily be a resort to arbitrary and capricious action which well might stultify the Congressional intent that responsible creditor participation in the processes of reorganization should be encouraged* by the allowance of reasonable compensation to the parties and their representatives for services reasonably essential to a just reorganization."

In another opinion rendered by the same Court in the same reorganization (46 Fed. Supp. 236), the Court said (p. 240):

> "The power of a Judge so to return a petition must be recognized unless Congress intended that a Judge should certify an allowance as "reasonable" although convinced that it was inadequate. *Such a law would stultify both author and agent.* Moreover, the *restriction* of allowances *to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible creditor and class participation in reorganizations.* This policy, in a sense, is *paramount* to the policy of economy in administration; were it otherwise the Act would have prohibited all allowance of compensation to the parties from the estate. *But plainly Congress did not want costless reorganizations rather than just reorganizations.* It follows that the true policy relating to economy is one adapted to preclude excessive expense—*not to enforce inadequate compensation.* Thus understood, the policy collides not at all with that of encouraging useful and responsible creditor representation by the allowance of adequate compensation through which that objective can be achieved."

The reasoning of the Court in construing the statutory intent is well applicable in the instant case. This court commented on this case in the *Bankers Trust case, supra,* but there is nothing there which is contrary to the reasoning in this case.

(b) "Maximum" and "Nothing" Are Not Synonymous.

The Commission was empowered to fix a *maximum limit.* It was not empowered to fix a *minimum* limit or "nothing" and in doing so it exceeded its jurisdiction.

In *Stevenson* v. *Flannery,* 117 P. (2) 717, the Court said (p. 720):

> "Maximum means the greatest possible quantity, amount or degree. It implies the comparison of one thing with another of a lesser degree."

No such comparison exists between "maximum" and "nothing." If the Commission may fix "nothing" as to the petitioners, then the Commission could have fixed the maximum of "nothing" as to all the parties. This would be an absurdity, and would be in violation of the intent of Congress, as said in re *New York N. H. & H. R. Co., supra,* 46 Fed. Supp. 236, 240, that "plainly Congress did not want costless reorganization rather than just reorganization." If the Commission was empowered to fix a maximum limit of "nothing" and if it had fixed such "nothing" as to all the parties, then there really would have been a stalemate or deadlock between the Commission and the Courts. This deadlock was discussed in re *New York N. H. & H. R. Co., supra,* and at page 241 the Court said:

> "To be sure, this seems a cumbersome procedure for the liquidation of an allowance. Indeed, *theoretically at least, the procedure may produce a deadlock between the Commission and the Judge* which may ultimately block a reorganization * * *. *And if ever a case shall arise resulting in a final deadlock instead of agreement, perhaps the disagreement can be solved by an appeal from the Judge's order disapproving the reasonableness of a reconsidered maximum set by the Commission.*"

The Commission was *not authorized to fix the lowest amount* but to fix *"the maximum limits"*. The Commission fixed "zero" or "nothing" under the *guise* of "maximum" limits. The term "maximum" is defined (Webster's New International Dictionary, 1925 Ed. p. 1333) as follows:

> "The greatest quantity or value attainable in a given case; or, the greatest value attained by a quantity which first increases and then begins to decrease; the highest point or degree;—opposed to *minimum.*"

The term "nothing" is defined (p. 1472) as follows:

> "Absence of all magnitude or quantity, however small, also a cipher; a zero; * * * that which is characterized by utter absence of determination."

This is synonymous with "zero" which is defined (p. 2369):

> "A constant less than any assignable magnitude or quantity; nothing; the lowest point; nothingness; nullity."

In *Croghan* v. *Savings Trust Co.*, 85 S. W. (2) 239, (Missouri, 1935), the court asked (p. 242):

> "What is nothing?"

It answered:

> "Lexicographers usually define it as naught; that which is non-existent; a non-entity. Shakespeare defines it through the mouth of Bassanio, as follows: 'Gratiano speaks an infinite deal of nothing, more than any man in all Venice. His reasons are two grains of wheat hid in two bushels of chaff, you shall seek all day ere you find them, and when you have them, they are not worth the search.' Merchant of Venice, Act I, Scene 1."

The term "maximum" is defined by the Supreme Court of Illinois in *Moweaqua Coal Corp.* v. *Industrial Commission*, 360 Ill. 194, at page 200, as follows:

> "There is, so far as we are advised, neither difference in nor shades of meaning given by lexicographers and the courts to the word 'maximum.' It is universally defined to mean the highest or greatest amount, quality, value or degree. Webster's New Int. Dict.; Century Dict. 1913 ed.; 6 Oxford Dict. 1908, p. 254; Funk & Wagnalls New Standard Dict.; *Trustees of Schools* v. *Berryman, supra; In re Hanaca, supra; Poolman* v. *Langdon, supra.*"

The Commission therefore exceeded its jurisdiction and it was the duty of the District Court to reject its report.

In disposing of the point that the Commission was without jurisdiction to fix "nothing" under a limitation of power to fix a "maximum", the opinion states (Tr. 60) that "if nothing was earned, nothing could be allowed, and therefore the maximum was nothing". The Court confused the two functions (1) the function of the Commission to fix the maximum allowance, and (2) the function of the Court *to make the allowance* within the "maximum." When a Commission fixes "zero" as a "maximum", *it strips the court of the power to make any allowance,* and thereby deprives the Court of its function. The question as to "how much" compensation or expenses should be fixed, is a *factual* question, and this was for the Commission to decide. But the question if *anything* should be allowed was purely a "judicial question". In fixing the allowance of "nothing" the Commission *exceeded its jurisdiction* and *usurped* the function of the court.

The concurring opinion of Mr. Justice Douglas in the *Bankers Trust* case (318 U. S. 163), is *most persuasive* on this point. He did not *dissent* from the majority opinion but *concurred.* There is nothing in the majority opinion which is at variance with his views on this point. There, he said (p. 174):

> "But the requirement in subsection (e) (2) that **the judge find that the awards are 'reasonable' negatives the idea that the findings of the Commissioner are conclusive.** Hence within the maximum limits of the total allowances for fees and expenses, **the Judge can make readjustments** — increasing or decreasing amounts awarded to the various claimants or granting allowances where none were made by the Commission. The contrary view was adopted in *In re Chicago, M., St. P. & P. R. R., supra,* pp. 374-375.

> The court felt that since subsection (e) (12) spoke of the 'maximum limits' and 'maximum allowances' fixed by the Commission, the findings of the Commission as to the maximum amount which each claimant could receive were conclusive. But that interpretation is difficult to reconcile with the requirement of subsection (e) (2) that the judge must find the allowances 'reasonable.' The use of the plural in subsection (e) (12) only indicates that the maximum allowance for fees and the maximum allowance for expenses are both to be fixed by the Commission." (Emphasis ours.)

The conception that the Commission might fix "nothing" as a "maximum" and deprive the courts of their function as now announced in this opinion is *diametrically opposed to the views expressed in the concurring opinion* on which the majority opinion *did not disagree.*

In *re Chicago North Western Railway Company*, 121 F. (2) 791, the Court discussed the effect of section 77(c) 12 on the point that the Bankruptcy Act provisions dealing with railroad reorganization *do not contemplate that a Federal District Court shall delegate* its judicial powers to the Interstate Commerce Commission and merely sign orders which the Commission advises or approve other orders which the Commission has made, but that *it contemplates an exercise of judicial functions.* This was specifically held in connection with the construction of §77 pertaining to the *maximum allowance.*

If the Commission be empowered to fix "nothing" as a maximum limit, then it must follow that it could have fixed "nothing" as to all the litigants. How could a court under such circumstances increase or decrease the "zero"? *It must follow that the Commission was without jurisdiction to fix "nothing" as the maximum limit,* and, therefore, its report must be rejected.

IV.

While Compensation May Not Be Allowed for Services Rendered By Intervenors Which Made No Contribution to the Proceedings or Plan, Yet the Compensation Does Not Hinge on the Success of Such Contributions.

Respondents contended below that compensation may be allowed only under §77 for services performed by intervenors in connection with the proceedings and plan which were successful, and that no compensation can be allowed when the intervenors were not successful. This whole discussion is *academic* for the reason that we have shown that the efforts were successful.

It is clear from the report that the Commission *did not fix the maximum limit on the success* of the efforts or contributions of the *several intervenors,* but considered the applications on the question whether the intervenors contributed to the proceedings and the plan in an attempt in good faith to represent their class and to obtain more favorable terms for them. *This is evident from the fact that the Commisison allowed a maximum fee* to the firm of Poppenhusen, Johnston, Thompson & Raymond, *who represented the protective committee for the preferred stock.* Their services are set forth in the Commission's report (R. 65). They were allowed $5,619.00 for their fees and $1,802.00 for the services of one of their witnesses and $1,875.00 and $331.00 for the services of another witness (R. 744). *They were not successful in their efforts as the preferred stock was completely wiped out.* They urged the consolidation of the North Western with the Milwaukee Road. They were unsuccessful in that respect. *They were unsuccessful* in any respect insofar *as it referred to the preferred stock,* yet the Commission *fixed a fee and the Court entered an order allowing the*

fee. This illustrates that both the District Court and the Commission *did not apply the test of success as a* prerequisite to compensation, but the *bona fide efforts* of the litigants *to obtain a better plan* for the class whom they represented. It is true that in determining the *amount* of compensation the success or failure of success must be considered, but this is only *one of the elements.* In fact, this view was adopted by the Commission in its report. The Commission said (R. 70):

> "In fixing the maximum limits of allowances to be paid out of the debtor's estate, we will give consideration, *among other things,* to the *benefits derived* by the debtor's estate from the several services performed."

It should be noted that the benefits was only *one* of the elements which the Commission considered.

The same view was taken by this Court in *Albert Dickinson Co.* v. *Dickinson Industrial Site,* 104 F. (2) 771. At page 775, it said:

> "In order that such reorganization take place, it was necessary for the bondholders themselves, or for attorneys representing them, or both, to render certain services. *That there is much false and foolish action of no benefit to the debtor estates and devoid of intelligence and good faith in many cases* brought nuder Section 77B, *does not affect the rule that compensation is due and should be awarded to those who render services of merit.*"

In another case (*Re Irving-Austin Building Corp.,* 100 F. (2) 574) attorneys who prosecuted an action for fraud were allowed $1800.00 for their services although they were unsuccessful in their efforts, on the ground that although they were unsuccessful in their efforts they were entitled to recover because they performed their services in good faith.

Where intervenors participate in reorganization proceedings and *endeavor in good faith to procure better results* for the class, they are entitled to compensation irrespective of the success or failure of success in their efforts, and that *the success is to be considered only as to the amount to be allowed* but not on the question whether any allowance should be made. An intervenor who in good faith urged the adoption of a better plan would be entitled to larger compensation if he succeeded in his efforts and to a smaller compensation if he did not succeed but would not be deprived of *any* compensation.

The adoption of a different rule would circumvent the intent of Congress that creditors should participate in reorganization proceedings. A creditor could not know in advance whether he would be successful and no one would risk to come into a proceeding and incur expenses and be represented by counsel if the reimbursement of the expenses would depend upon success of the efforts. In the *New Haven* case (46 F. Supp. 236), the Court said (p. 240):

> "Moreover, the restriction of allowances to inadequate dimensions would tend to nullify the policy of the Act to encourage responsible credit and class participation in reorganizations. This policy, in a sense, is paramount to the policy of economy in administration: were it otherwise, the Act would have prohibited all allowances of compensation to the parties of the estate."

This applies with greater force to the power of the Commission to deny any compensation or reimbursement of expenses because of the failure to prevail.

(a) Section 77, as distinguished from 77B, authorizes allowances of expenses to parties and fees to their attorneys, regardless of benefits rendered to the estate.

The report of the Commission is based upon a misconception of law that under §77 parties and their attorneys are not entitled to their expenses if no benefit resulted to the estate and is inconsistent with its report relating to the other intervenors as shown above. The benefits resulting to the estate is a factor in determining the amount of the compensation but is not to be considered on the question whether *any* compensation or expenses should be allowed.

(1) There is no requirement under Section 77 that attorneys representing creditors succeed in their efforts in order to entitle them to compensation.

We have shown above that the intervenors and their counsel, the petitioners, have made valuable contributions to the estate. But, even if no benefits resulted to the estate, they were still entitled to the reimbursement of the expenses and to the compensation for their counsel. The Commission based its decision on the rule applicable to Section 77B which has no application to Section 77.

Section 77B requires that parties representing creditors *contribute beneficially to the estate. There is no such* requirement under Section 77. The Section authorized compensation to attorneys representing creditors *without regard as to whether the attorneys are successful or not.* The question is only whether they were let in to represent creditors who were parties to the record and whether they represented them in good faith on matters in which their rights were involved. All creditors who participated

in bringing about the submission of the plan are entitled to reimbursement for the expenses and the reasonable compensation of their attorneys. The fact that the Court and the Commission allowed the intervention is to be considered in favor of the allowance of expenses and fees (*Steere* v. *Baldwin Locomotive Works*, 98 F. (2) 889).

Under 77B the plan is approved by the creditors in *advance* and the approval of the court *follows*. Therefore, unless the parties contributed something constructive to the modification of the plan which was approved by the creditors they should not be entitled to compensation. The situation under Section 77 is different as the Act provides *that the plan is first to be approved by the Commission and by the court before it is submitted to the creditors.*

In Section 77B the allowance can only be made *after the approval of the plan by the creditors and by the court*, while under Section 77 *the allowance can be made even if the plan is rejected by the creditors and the court.* It is apparent therefrom that *the compensation under 77 is not measured by the approval or disapproval of the plan or by the contributions to the approval of the plan but by the services rendered leading up to the submission of the plan, regardless of its final success.* Section 77 (c) (12) allows compensation "for the actual and reasonable expenses, including reasonable attorneys' fees *incurred in connection with the proceedings and plan.*" It is *not conditioned* upon a contribution to the *final* adoption of the plan. The disallowance of the expenses of these intervenors and the fees of their counsel is based on the *mistaken conception* that the law applicable to Section 77B is also applicable to Section 77, which is not the case, as shown above. This discussion is, however, only for

academic purposes as appellants *did render valuable services* to the estate.

(2) Parties to the proceedings or those who were let in by intervention are entitled to their expenses and the reasonable fees for their attorneys, regardless of the success of their efforts.

Section 77(c) (12) authorizes the allowance of expenses of the parties and the compensation of their attorneys. The Court and the Commission had the privilege to deny the intervention and petitioners would not have been parties to the proceedings, and if they performed any services they could not claim reimbursement for expenses and the fees of their attorneys. Both, however, the Court and the Commisison, *granted the intervention.* It must be assumed that *they properly exercised their discretion* and that the intervention was necessary. Petitioners, therefore, became parties to the proceeding by the orders of the Court and the Commission. The Commission's power was, therefore, *limited to fixing a "maximum"* amount to expenses and fees, and the functions of the Court were *to determine the "reasonableness" of the charges.* Neither the Commission nor the Court had the right to deny the *total* fees and expenses. The rule that the powers of the Court are limited in passing on the reasonableness of the amount but that the Court is without power to deny *any* amount where the party comes within the Act was squarely held *In Re Building Development Company,* 98 F. (2) 844, C. C. A. 7. There the Court also said (p. 846):

> "The rule which clearly is deductible from authorities is that where the party designated by the Act renders services in connection with the proceeding and plan, the court may not, unless some special justification, refuse to allow any compensation whatever."

While the fixing of a maximum allowance is a factual determination which was within the powers of the Commission, *the denial of any compensation requires a judicial determination*, which was not within the power of the Commission. (*Re American Mail Line*, 115 F. (2) 196, 198. We have previously cited the opinion in *re New York, N. H. & H. R. Co.*, 46 Fed. Supp. 214, 219, on the point that it was the intent of Congress that responsible creditor participation in the processes of reorganization should be encouraged. This intent will be stultified if the Commission may fix a mimimum limit of "zero" so that the Courts would be helpless to allow compensation even where the services were of great benefit.

The opinion states (Tr. 61) that there is no occasion to "recede" from what it said in the prior appeal, that "no allowance can be had where no benefits resulted to the estate." It was not necessary for the court to *recede* from its former opinion, but only to "define" the word "benefit". If the word "benefit" means "success", then, with the exception of the change in the form of the Voting Trust, and the elimination of the cumulative interest features, petitioners may not have benefited the estate. However, if "benefit" means, participation in a reorganization on behalf of a class in an attempt to obtain more favorable treatment, presented in good faith, and which even resulted in the *reversal* of the approved Plan on appeal (*Abrams, et al.* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 124 F. (2d) 754) then petitioners have *benefited* the estate. True, the Court reversed the decision of the Circuit Court (318 U. S. 523). We were *not successful* on the final appeal. So were other parties unsuccessful.* The attorneys representing the

* Since the decision of this court the Commission filed a supplemental report making many changes which were supported by the Institutional Groups, and by the "Abrams Group".

Protective Committee on behalf of the Common Stock *even lost their appeal in this Court.* They lost before the Supreme Court of the United States, and yet *they were allowed compensation.* It must be evident therefrom that the *test* of "benefit" was not determined by the "success" of the effort, but from the manner of the presentation of the issues for which compensation for services was requested.

The opinion says (Tr. 61) that petitioners have lost sight of the fact that "both in the proceedings in equity and in bankruptcy," it is the "ordinary rule" that attorneys representing creditors, security holders or stockholders must look for compensation to their clients, rather than to the general estate. We have *not lost sight of this proposition,* but have taken into consideration the fact that § 77(c)12 expressly provided for the *compensation of attorneys* on behalf of *intervenors,* and it expressly provides for the payment of *expenses.* The "ordinary rule" is, therefore, wholly inapplicable.

V.

Rule 52 (a) Was Mandatory Upon the District Court, and Its Order Must Be Reversed Because of the Violation of the Rule.

Rule 52(a) of the new Federal Rules provides that: "The Court shall find the facts *specifically* and state *separately* its conclusions of law thereon and direct the entry of the appropriate judgment." The *alleged* "finding and conclusion" which the Court filed (Tr. 27) is in *violation* of the Rule.

(a) Rule 52 (a) was mandatory upon the District Court and a reversal must follow for its violation of the rule.

The requirements of the Rule for *specific* findings and *separate* conclusions were held to be *mandatory* (*Shannon* v. *Retail Clerks Int. P. Ass.*, 128 F. (2) 553, 555). Rule 52(a) is for the benefit of the upper Court and also has "a far more important purpose—that of evoking care on the part of the trial Judge in ascertaining the facts". It is also a "check" on review, so that the reviewing court may determine the correctness of the District Court's findings (*U. S.* v. *Forness*, 125 F. (2) 928, 942). The rule was made applicable in Bankruptcy (*Perry* v. *Boumont*, 122 F. (2) 409).

Here, the District Court satisfied itself with the statement (Tr. 27) that it examined the evidence and that the report of the Commission is sustained by substantial evidence. This is *not* in compliance with the Rule, which requires *specific* findings and *separate* conclusions.

(b) Rule 52 (a) is expressly applicable to the instant case.

The only exception in Rule 52(a) dispensing with *specific* findings and *separate* conclusions is concerning a Master's report where the Court may adopt the findings and conclusion of the Master. This is inapplicable to the Report of the Commission which cannot be classed in the category of a report of a Master in Chancery.* A Master in Chancery examines the law and the evidence and his report is *advisory* to the Court. The report of the Commission under §77(c) 12 *lacks such characteristics.* Its report is *not* advisory as to the allowances and is *controlling* on the *maximum fees.* The *Judicial deter-*

* Here the court did not adopt the findings and conclusions but filed "findings and conclusions". When it exercised its function to file "findings" and "conclusions" it was its duty to file proper findings.

mination, as to the allowance of fees and expenses, *within the maximum* is to be performed by the court *independently* of the Commission's report. Therefore, its report does not serve the purpose of the usual report of a Master in Chancery in equity cases. Besides, *even a Master's report which does not contain specific findings cannot be the foundation for a judicial determination.* Where the Master's report consists of conclusions in lieu of specific findings, *his report cannot be adopted,* and the Court *must make findings of its own* (*Helfer* v. *Corona Products, Inc.,* 127 F. (2) 612; *Kelley* v. *Everglades Drainage District,* 319 U. S. 415, 418, 63 S. Ct. 1141, 1144). There, this court held that Rule 52-a is applicable in bankruptcy. The Commission's report also *lacked specific findings* and merely contained *conclusions.* The report could not form the basis for the Court's findings. The Commission stated in its report concerning the claim of the petitioners that their services contributed to the abandonment of the unfair plan, that it was "not persuaded that the evidence supports such statement". *This was simply a conclusion* which the court improperly adopted in lieu of making a specific finding.*

The Court did not point out to any of the evidence which tends to support the report. *In fact, there is no such evidence in the whole record.* No one offered any evidence against the petitioners and no objections were even filed.

The statement of the Court must rest, therefore, on the statement of the Commission that it was not "persuaded" "that the evidence supports" the claim for compensation. This statement of the Commission did not refer to any evidence *against* the petitioners but to the *alleged weakness in the evidence submitted by the peti-*

* The Commission referred to petitioners' evidence and not to any other evidence. The statement of the court that there is "substantial evidence" cannot be based on such a report.

tioners. Upon the *misconception* that the Commission referred to evidence offered against the petitioners, the Court stated that (Tr. 27) *"there is substantial evidence to sustain the findings"* of the Commission. What was this evidence? *We challenge counsel for the respondents to produce any such evidence.*

If the Court had made specific findings as required under Rule 52(a), it would not have made the *obvious* error.

The Commission based its "maximum limit" of "nothing" on the *failure to be persuaded by petitioners' evidence.* This it had no right to do as *neither a Court nor a Commission may disregard the unimpeached testimony of a witness* (*Kelly* v. *Jones,* 290 Ill. 375, 378; *Mammina* v. *Homeland Insurance Co.,* 371 Ill. 555, 560.

The Commission stated (Tr. 27) that it was not "persuaded" that "the evidence" of the petitioners "supports" the statement that they were "primarily responsible for the abandonment of the first plan". The quoted statement appears in the petition (R. 20) slightly different in form. It states:

> "Petitioner believes that the evidence adduced by him at the first hearings before the Interstate Commerce Commission was primarily responsible for the abandonment of the first plan."

This *belief* was justified as it appears from the above discussion (pp. 18-27) of the proceeding before the Commission.

It is noteworthy that while Mr. Abrams was cross-examined by the Trustees' counsel (Tr. 20) and by the Examiner (Tr. 22), *not one question was asked of him on this point,* and no one even disputed it. Mr. Abrams testified (Tr. 16):

> "When it came to the second hearing, in September 1937, the same witnesses who had originally testified that the plan was equitable, fair and feasible, and who, in answer to my question had so testified, were compelled to admit that the plan was unfair, inequitable and unfeasible."

They were compelled to make their admissions because of the objectionable features which were pointed out by him as shown above (pp. 18-27).

It was stipulated by the parties that all the petitions that were filed by the respective parties and verified, be treated as evidence, subject to cross-examination.* *No evidence was offered tending to refute the statement contained in the petition.* No cross-examination was had on this subject matter. What "substantial evidence" is there in this record to justify the statement of the court in sustaining Commission's report o nthe ground that there was such evidence? *We call upon respondents to point it out to this Court.*

The second point on which the Commission stated that it "was not persuaded" that *petitioners' evidence* "supports" their statement, was relating to the statement that their efforts contributed to the abandonment of the Voting Trust (Tr. 27). The Court stated that there was "substantial evidence" to support this report. *We again challenge the respondents to point to anything in the record tending to justify the court's finding.* No such evidence was ever offered.

The only evidence which appears in the record pertaining to petitioners' claim for fees, *is the evidence which*

* This stipulation is contained in the complete record on the applications of the other parties and the appellees have conceded below that there was such a stipulation and we are sure that they will so concede here.

they offered. Their evidence was also *corroborated* by the proceedings before the Commission, showing that they opposed the Voting Trust (Vol. I, pp. 413-14). They filed specific objections to the Voting Trust which were recommended by the Examiner (R. 17, 18) and the testimony of Mr. Abrams (Tr. 17, 18) was undisputed.

The report of the Commission of February 12, 1940, *eliminated* the Voting Trust. Counsel for the Trustees brought out by their cross-examination that the Voting Trust was reincorporated in the subsequent report of the Commission of June, 1940. Mr. Abrams, however, pointed out (Tr. 21) *that the new Voting Trust was completely different* from the Voting Trust which was contained in the 1935 plan, in that such Trust gave no representation to the adjustment mortgage bonds, *while the new Voting Trust provided for their representation.* Besides, the petition for fees covered the period up to May 1, 1940, under the order of the Court, and the report of June, 1940, did not affect the services rendered prior to that date which produced the first report eliminating the Voting Trust.

What "substantial evidence" or *any* evidence is there in this record to justify the "findings and conclusions" of the Court on this issue? The entire record of the hearings before the Commission (Vols. I, II, III, IV and V) is now before this Court and was made a part of this record by the stipulation of the parties (Tr. 48) and by the order of this Court (Tr. 52). *Not one word will be found in this record to sustain the alleged "substantial" evidence.*

In deciding that Rule 52(a) was inapplicable, the opinion stresses the point that the question whether the report is sustained by "substantial evidence" presented

"as a matter of law" such question to the District Court, and that it was not a "question of fact", and therefore Rule 52(a) is inapplicable. The Court overlooked the fact that the evidence in this case *was not disputed.* The question therefore was not as "a matter of law" whether the report was sustained by substantial evidence, but as *"a matter of fact"* whether there was "substantial evidence" to support the report. This was squarely held in *Rassieur et ux.* v. *Commissioner of Internal Revenue,* 129 F. (2d) 820, 821:

> "There is no dispute as to the *evidentiary facts.* The question here is whether the evidentiary facts constitute *substantial evidence* to support the ultimate fact found by the Board, that this stock became worthless prior to taxpayer's tax year of 1933. **This is a question of fact.**" *Helvering* v. *Ames,* this Court, 71 F. (2d) 939, 943.

In *Labor Board* v. *Columbian Company,* 306 U. S. 292, the Supreme Court said:

> "Section 10(e) of the Act provides '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is *substantial,* that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. *Washington V. & N. Coal Co.* v. *National Labor Relations Board,* 301 U. S. 142; *Consolidated Edison Company* v. *National Labor Relations Board,* 93 F. (2d) 985, 989; *Thompson Products Inc.,* 97 F.(2d) 13; *Rallston-Stillwater Knitting Co.* v. *National Labor Relations Board,* 98 F. (2d) 758, 764. Substantial evidence, is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v.

> *National Labor Regulations Board, supra,* p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See *Baltimore & Ohio R. R. Co.* v. *Groeger,* 226 U. S. 521, 524; *Gunning* v. *Cooley,* 281 U. S. 90, 94; *Appalachian Electric Power Co.* v. *National Labor Relations Board, supra,* 989."

There is also a distinction on the question whether a finding is supported by evidence on a motion for directed verdict and a question whether the report of an administrative body is supported by evidence. In the first, the court deals with a question of law, whether there is "*any*" evidence to support the finding. In the latter, the Court deals with a *question of fact* whether there is "substantial evidence" to support the report. A determination whether there is *substantial evidence* requires consideration of the evidence, which is a *factual question.* 4 Corpus Juris, page 645, § 2538; 5 Corpus Juris, page 26, § 1455.

The Court also overlooked the point that the District Court *was not sitting as a court of review of the report of the Commission herein.* §77(c)12 conferred the *exclusive power* and jurisdiction *on the Court to make the allowance* within the maximum limit as fixed by the Commission. This required the *independent judgment* of the Court as to the allowance, and therefore it was *bound* to comply with Rule 52(a), which was made applicable to Bankruptcy cases.

The construction of Rule 52 (a) in the instant case is squarely opposite to the construction of the Rule by the Court of Appeals for the District of Columbia in *Nat. Savings & T. Co.* v. *Shutack,* rendered December 6, 1943 (F. R. S. 52 a 3).

It is true that in the *Bankers Trust* case (318 U. S. 163) this Court stated that § 77 (e) does not contemplate a hearing *de novo* on the "reasonable worth of the services" or "a reappraisal by the Court of the facts" and that such construction leaves the Court "free to decide" all "questions of law" but this Court did not intend to withdraw from the court the consideration of the "factual" question whether the report is sustained by "substantial evidence" when the evidence was not in dispute. There, the Court said (p. 170):

> "Our conclusion is that the function committed by the law to the Commissioner is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a court."

This repels the conception that the court does not pass on factual questions when it examines the undisputed facts to determine whether the report is supported by "substantial evidence" as held in *Rassieur* v. *Commissioner of Internal Revenue*, 129 F. (2d) 820, 821. This Court determined that the District Court does not hear the matter *de novo*, but it did not hold that in passing on the question whether the report is supported by "substantial evidence" it should not consider the undisputed facts to determine from them whether it supports the report. This more fully appears in the statement of the Court (p. 170):

> "At law the jury's verdict settles issues of facts and defines rights, subject only to questions of law. In administrative procedure, all findings of the administrative body may likewise be made conclusive of fact issues, and equally define rights and duties, subject only to questions of law."

At law, where the court passes on the question whether the verdict is supported by *any* evidence, it only passes on "questions of law", but when it passes on the ques-

tion whether it is supported by "substantial evidence" it considers the matter as *a question of fact* (4 Corpus Juris, page 64 *supra*).

In considering the question whether Rule 52(a) was applicable, the court also lost sight of the point that the *report of the Commission contained conclusions* that were barren of any findings of fact and *the court was bound to make findings as required under Rule* 52(a). The application of Rule 52(a) to such a report, which substituted "conclusions" for "findings" was recently decided in two yet unreported decisions of the District Court of New York (See C. C. H. Bankruptcy Law Service, Pars. 54,484, and 44,490; *In re George R. Burdett, Inc.*, (S. D. N. Y., July 12, 1943), and *In re Ames Furniture Co., Inc.* (E. D. N. Y., June 2, 1943).

CONCLUSION.

Five years of service were performed by the petitioners. There is no dispute about the time spent, the good faith, and the skill in performing the services. Petitioners were the only class of attorneys who were *singled out* with a *maximum reward* of *"nothing"* out of the $312,624.00 which was allowed (R. 36-38). The *maximum* of "nothing" cannot be based on the theory that the services were not beneficial, as this limit was not applied to the attorneys for the preferred stockholders' committee and the attorneys for the common stockholders *who did not contribute any beneficial service to the estate.* Their services consisted only in an attempt to procure benefits for the classes whom they represented in which they did not succeed. Besides, the services of petitioners were of great benefit to the estate.

We will summarize the services performed by the petitioners which were beneficial to the estate which consumed about one thousand hours for a period of five years. The services consist:

(a) Opposing the inequitable 1935 plan, causing its abandonment, and eliminating the inequitable features from the later plans in the following manner:

(1) Pointing out that the "cumulative" contingent interest under the General Mortgage operated to make the plan unfeasible.
(Vol. I, p. 415)

(2) Urging that the cumulative contingent interest on the fifty-year Mortgage might result in wiping out the new securities to be issued for the Adjustment Mortgage Bonds.
(Vol. I, p. 415)

(3) Showing that the complicated capital structure was unsound as the debtor would have emerged from the reorganization as a cripple, being short a million and a half to pay the "fixed" interest, besides the "cumulative" contingent interest.
(Vol. I, p. 403)

(4) Petitioners suggested the complete change of the capital structure by the issuance of new securities covering the entire system instead of retaining the complicated structure of the divisional mortgages.
(Vol. I, p. 404)

(5) Petitioners opposed the voting trust which deprived the class of Adjustment Mortgage bonds from representation.
(Vol. I, pp. 413, 414)

(b) Opposition to the 1938 plan, and obtaining Modifications:

(1) Opposed the change from 4½% to 5% on the new "B" bonds.
(Vol. II, pp. 821, 822)

(2) Opposed New Voting Trust without representation of the Adjustment Mortgage Bondholders.
(R. 17-18)

(3) Opposed surrender of lien claim of Adjustment Mortgage on "free assets".
(Vol. II, p. 812) (R. 17)

(4) Urged additional compensation for the surrender of the claim on the "free assets".
(Vol. II, pp. 812-813; R. 17)

(5) Opposed allottment of common stock without findings as to value.
(R. pp. 18-19)

(6) Urged allottment of securities for accrued interest to January 1, 1939.
(Vol. II, p. 811)

(c) Aided the Commission in the conduct of the hearings and in having it formulate a plan of its own.
(Vol. II, pp. 666-675)

Objection (a) (1) and (a) (2) were eliminated by the admission of the proponents of the plan that the objections were proper and that the plan which they originally sponsored as fair and feasible, was not feasible and it was necessary to file an amended plan.
(Vol. II, pp. 600, 687)

Point (a) (3) was *conceded* by the chairman of the Institutional Groups who stated that it was necessary to file a *new* complete plan providing for a *sound* Capital structure.
(Vol. II, p. 725)

Objection (a) (5) was sustained when the Commission rendered its report eliminating the Voting Trust.
(Vol. V, p. 2264)

Objection (b) (1) was sustained when the Commission approved 4½% instead of 5% on the "B" bonds.
(Vol. V, pp. 2232)

Objection (b) (2) was eliminated when the Commission provided that one of the Voting Trustees should be named by the Trustee for the Adjustment Mortgage.

(Vol. III, p. 1314)

Objection (b) (3) was *sustained*, and suggestion (b) (4) was *adopted*, when the Commission allowed 39,000 shares of new common stock for the surrender of the claim on the "free assets".

(Vol. V, pp. 2256-57)

Objection (b) (5) was sustained by this Court when it reversed the decree of the District Court (*Abrams* v. *Group of Institutional Investors et al.*, 124 F. (2) 754, 765).

The reversal of the decision of this Court by the Supreme Court (*Group of Investors* v. *Abrams et al.*, 318 U. S. 523), would, of course, not affect the right to the compensation.

Objection (b) (6) was overruled by the District Court but was especially considered and passed upon by the Supreme Court (318 U. S. pp. 523, 573). The good faith in raising this objection is, therefore, not open to challenge.

The aid given to the Commission, as stated under point (c), in the conduct of the hearings, in curtailing the hearings by unnecessary testimony which was based and contained in voluminous exhibits (Vol. II, pp. 674-675) which would have taken up a great deal of time of the Commission and of the respective attorneys, and for which the Commission would have undoubtedly fixed a larger amount for the "maximum limits", was completely

overlooked, when the maximum limit of "nothing" was applied to the appellants.

In urging the denial of the indenite delay, unless an amended plan would be filed at a short date to be fixed by the Commission, or in the absence thereof, that the Commission should formulate a plan of its own (Vol. II, pp. 667-8), which the Commission sustained when it denied the indefinite postponement and when it adopted a plan of its own (as suggested by petitioners) they, the petitioners, have performed beneficial service to the estate.

The reward of "zero" or "nothing" for such faithful services cannot be sustained by an unbiased tribunal.

For the reasons urged above, we urge the issuance of the writ so that the order be reversed and that this court may adopt the proposed findings and conclusions and that it may give the proper directions upon remandment.

Respectfully submitted,

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